

STEVEN M. ZADRAVECZ (BAR NO. 185676)  
E-mail: szadravec@jonesday.com  
CHRISTOPHER HODSON (BAR NO. 246461)  
E-mail: chodson@jonesday.com  
JONES DAY  
3 Park Plaza, Suite 1100  
Irvine, CA 92614  
Telephone: (949) 851-3939  
Facsimile: (949) 553-7539

Attorneys for Defendant  
MERVYN'S, LLC

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

A.J. OLIVER,

Plaintiff,

v.

MERVYN'S, LLC; SWEETWATER  
SQUARE, LLC; AARDEMA  
GRANDCHILDREN'S LP,

Defendants.

Case No. 08 CV-1108 WQH (WMc)

**DEFENDANT MERVYN'S LLC'S  
ANSWER TO PLAINTIFF'S  
COMPLAINT**

Pursuant to Federal Rule of Civil Procedure 12(a), defendant Mervyn's, LLC  
("Mervyn's"), for itself only, hereby answers the Complaint of plaintiff A.J. Oliver ("Plaintiff")  
as follows:

1. Mervyn's admits that this action purports to involve the Mervyn's store located at  
3007 Highland Avenue, National City, California 91950 (the "Mervyn's Facility"). Except as  
expressly admitted, Mervyn's denies each and every allegation in Paragraph 1 of the Complaint to  
the extent the allegations relate to Mervyn's.

2. Mervyn's admits that Plaintiff purports to seek damages, injunctive and declaratory  
relief, and attorneys' fees and costs under various state and federal statutes as alleged in  
Paragraph 2 of the Complaint. Except as expressly admitted, Mervyn's denies each and every

1 allegation in Paragraph 2 of the Complaint to the extent the allegations relate to Mervyn's, and  
2 further denies that Plaintiff has suffered damages in any amount, or at all. Mervyn's denies for  
3 lack of sufficient knowledge, information, and belief each and every allegation in Paragraph 2  
4 that relates to entities other than Mervyn's.

5 3. Mervyn's admits that this Court has jurisdiction over claims arising under the  
6 Americans with Disabilities Act under 28 U.S.C. Sections 1331 and 1343 to the extent that such  
7 claims are not otherwise barred. Except as expressly admitted, Mervyn's denies each and every  
8 allegation in Paragraph 3 of the Complaint.

9 4. Mervyn's admits that Plaintiff attempts to invoke this Court's supplemental  
10 jurisdiction with respect to her state law claims. Except as expressly admitted, Mervyn's denies  
11 each and every allegation in Paragraph 4 of the Complaint.

12 5. Mervyn's denies each and every allegation in Paragraph 5 of the Complaint.

13 6. Mervyn's admits that 28 U.S.C. Sections 1391(b) and (c) pertain to venue, and that  
14 Plaintiff alleges venue pursuant to 28 U.S.C. Sections 1391(b) and (c). Except as expressly  
15 admitted, Mervyn's denies for lack of sufficient knowledge, information, and belief each and  
16 every allegation in Paragraph 6 of the Complaint.

17 7. Mervyn's admits that it owns, operates, or leases the Mervyn's facility, and that it is a  
18 limited liability corporation. Except as expressly admitted, Mervyn's denies each and every  
19 allegation in Paragraph 7 of the Complaint.

20 8. Mervyn's denies for lack of sufficient knowledge, information, and belief each and  
21 every allegation in Paragraph 8.

22 9. Mervyn's admits that the Mervyn's Facility is a retail establishment that is open to  
23 the public. Except as expressly admitted, Mervyn's denies each and every allegation in  
24 Paragraph 9 of the Complaint.

25 10. Mervyn's denies each and every allegation in Paragraph 10 of the Complaint.

26 11. Mervyn's denies each and every allegation in Paragraph 11 of the Complaint.

27 12. Mervyn's denies each and every allegation in Paragraph 12 of the Complaint.

28 13. Mervyn's denies each and every allegation in Paragraph 13 of the Complaint.

1 14. Mervyn's denies each and every allegation in Paragraph 14 of the Complaint.

2 15. Mervyn's denies each and every allegation in Paragraph 15 of the Complaint.

3 RESPONSE TO THE FIRST CLAIM FOR RELIEF

4 **Americans with Disabilities Act of 1990**

5 16. Mervyn's incorporates by this reference its responses to Paragraphs 1 through 15,  
6 inclusive, of the Complaint.

7 17. Paragraph 17 of the Complaint contains only assertions and conclusions of law to  
8 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 17  
9 that Mervyn's has in any way violated the Americans with Disabilities Act or any other state or  
10 federal statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in  
11 Paragraph 17, Mervyn's denies each and every allegation in Paragraph 17 of the Complaint.

12 18. Mervyn's denies each and every allegation in Paragraph 18 of the Complaint.

13 19. Paragraph 19 of the Complaint contains only assertions and conclusions of law to  
14 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 19  
15 that Mervyn's has in any way violated the Americans with Disabilities Act or any other state or  
16 federal statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in  
17 Paragraph 19, Mervyn's denies each and every allegation in Paragraph 19 of the Complaint.

18 20. Paragraph 20 of the Complaint contains only assertions and conclusions of law to  
19 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 20  
20 that Mervyn's has in any way violated the Americans with Disabilities Act or any other state or  
21 federal statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in  
22 Paragraph 20, Mervyn's denies each and every allegation in Paragraph 20 of the Complaint.

23 21. Mervyn's denies each and every allegation in Paragraph 21 of the Complaint.

24 22. Mervyn's denies each and every allegation in Paragraph 22 of the Complaint.

25 23. Mervyn's admits that the Mervyn's Facility was designed and constructed after  
26 January 26, 1992. The remaining allegations in Paragraph 23 of the Complaint contain only  
27 assertions and conclusions of law to which Mervyn's is not required to respond. To the extent  
28 that Plaintiff implies in Paragraph 23 that Mervyn's has in any way violated the Americans with

1 Disabilities Act or any other state or federal statute, rule, or regulation, or to the extent that  
2 Plaintiff makes any factual assertions in Paragraph 23, Mervyn's denies each and every allegation  
3 in Paragraph 23 of the Complaint.

4 24. Paragraph 24 of the Complaint contains only assertions and conclusions of law to  
5 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 24  
6 that Mervyn's has in any way violated the Americans with Disabilities Act or any other state or  
7 federal statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in  
8 Paragraph 24, Mervyn's denies each and every allegation in Paragraph 24 of the Complaint.

9 25. Mervyn's denies each and every allegation in Paragraph 25 of the Complaint.

10 26. Mervyn's denies each and every allegation in Paragraph 26 of the Complaint.

11 27. Paragraph 27 of the Complaint contains only assertions and conclusions of law to  
12 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 27  
13 that Mervyn's has in any way violated the Americans with Disabilities Act or any other state or  
14 federal statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in  
15 Paragraph 27, Mervyn's denies each and every allegation in Paragraph 27 of the Complaint.

16 28. Mervyn's denies each and every allegation in Paragraph 28 of the Complaint.

17 29. Paragraph 29 of the Complaint contains only assertions and conclusions of law to  
18 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 29  
19 that Mervyn's has in any way violated the Americans with Disabilities Act or any other state or  
20 federal statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in  
21 Paragraph 29, Mervyn's denies each and every allegation in Paragraph 29 of the Complaint.

22 30. Mervyn's denies each and every allegation in Paragraph 30 of the Complaint.

23 31. Mervyn's admits that Plaintiff purports to seek injunctive relief, attorneys' fees,  
24 costs, and legal expenses as alleged in Paragraph 31 of the Complaint. Except as expressly  
25 admitted, Mervyn's denies each and every allegation in Paragraph 31 of the Complaint, denies  
26 that Plaintiff has suffered damages in any amount, or at all, and further denies that Plaintiff is  
27 entitled to any form of relief in this action.

1           32. Mervyn's admits that Plaintiff purports to seek declaratory relief as alleged in  
2 Paragraph 32 of the Complaint. Except as expressly admitted, Mervyn's denies each and every  
3 allegation in Paragraph 32 of the Complaint, denies that Plaintiff has suffered damages in any  
4 amount, or at all, and further denies that Plaintiff is entitled to any form of relief in this action.

5                           RESPONSE TO THE SECOND CLAIM FOR RELIEF

6                                   **Disabled Persons Act**

7           33. Mervyn's incorporates by this reference its responses to Paragraphs 1 through 30,  
8 inclusive, of the Complaint.

9           34. Paragraph 34 of the Complaint contains only assertions and conclusions of law to  
10 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 34  
11 that Mervyn's has in any way violated California Civil Code or any other state or federal statute,  
12 rule, or regulation, or to the extent that Plaintiff makes any factual assertions in Paragraph 34,  
13 Mervyn's denies each and every allegation in Paragraph 34 of the Complaint.

14           35. Paragraph 35 of the Complaint contains only assertions and conclusions of law to  
15 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 35  
16 that Mervyn's has in any way violated the California's Disabled Person's Act or any other state or  
17 federal statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in  
18 Paragraph 35, Mervyn's denies each and every allegation in Paragraph 35 of the Complaint.

19           36. Paragraph 36 of the Complaint contains only assertions and conclusions of law to  
20 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 36  
21 that Mervyn's has in any way violated the California's Disabled Person's Act or any other state or  
22 federal statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in  
23 Paragraph 36, Mervyn's denies each and every allegation in Paragraph 36 of the Complaint.

24           37. Mervyn's denies each and every allegation in Paragraph 37 of the Complaint.

25           38. Mervyn's admits that Plaintiff purports to seek damages, declaratory relief, and  
26 other remedies as alleged in Paragraph 38 of the Complaint. Except as expressly admitted,  
27 Mervyn's denies each and every allegation in Paragraph 38 of the Complaint, denies that Plaintiff  
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1 has suffered damages in any amount, or at all, and further denies that Plaintiff is entitled to any  
2 form of relief in this action.

3 39. Mervyn's admits that Plaintiff purports to seek injunctive relief and attorneys' fees  
4 as alleged in Paragraph 39 of the Complaint. Except as expressly admitted, Mervyn's denies each  
5 and every allegation in Paragraph 39 of the Complaint, denies that Plaintiff has suffered damages  
6 in any amount, or at all, and further denies that Plaintiff is entitled to any form of relief in this  
7 action.

8 RESPONSE TO THE THIRD CLAIM FOR RELIEF

9 **Unruh Civil Rights Act**

10 40. Mervyn's incorporates by this reference its responses to Paragraphs 1 through 30,  
11 inclusive, of the Complaint.

12 41. Paragraph 41 of the Complaint contains only assertions and conclusions of law to  
13 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 41  
14 that Mervyn's has in any way violated the California Unruh Act or any other state or federal  
15 statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in Paragraph  
16 41, Mervyn's denies each and every allegation in Paragraph 41 of the Complaint.

17 42. Paragraph 42 of the Complaint contains only assertions and conclusions of law to  
18 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 42  
19 that Mervyn's has in any way violated the California Unruh Act or any other state or federal  
20 statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in Paragraph  
21 42, Mervyn's denies each and every allegation in Paragraph 42 of the Complaint.

22 43. Paragraph 43 of the Complaint contains only assertions and conclusions of law to  
23 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 43  
24 that Mervyn's has in any way violated the California Unruh Act or any other state or federal  
25 statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in Paragraph  
26 43, Mervyn's denies each and every allegation in Paragraph 43 of the Complaint.

27 44. Mervyn's denies each and every allegation in Paragraph 44 of the Complaint.  
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1           45. Mervyn's denies each and every allegation in Paragraph 45 of the Complaint.

2           46. Mervyn's denies each and every allegation in Paragraph 46 of the Complaint, denies  
3 that Plaintiff has suffered damages in any amount, or at all, and further denies that Plaintiff is  
4 entitled to any form of relief in this action.

5           47. Mervyn's admits that Plaintiff purports to seek injunctive relief and attorneys' fees  
6 as alleged in Paragraph 47 of the Complaint. Except as expressly admitted, Mervyn's denies each  
7 and every allegation in Paragraph 47 of the Complaint, denies that Plaintiff has suffered damages  
8 in any amount, or at all, and further denies that Plaintiff is entitled to any form of relief in this  
9 action.

10                           RESPONSE TO THE FOURTH CLAIM FOR RELIEF

11                           **Denial of Full and Equal Access to Public Facilities**

12           48. Mervyn's incorporates by this reference its responses to Paragraphs 1 through 13,  
13 inclusive, of the Complaint.

14           49. Paragraph 49 of the Complaint contains only assertions and conclusions of law to  
15 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 49  
16 that Mervyn's has in any way violated the California Health and Safety Code or any other state or  
17 federal statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in  
18 Paragraph 49, Mervyn's denies each and every allegation in Paragraph 49 of the Complaint.

19           50. Paragraph 50 of the Complaint contains only assertions and conclusions of law to  
20 which Mervyn's is not required to respond. To the extent that Plaintiff implies in Paragraph 50  
21 that Mervyn's has in any way violated the California Health and Safety Code or any other state or  
22 federal statute, rule, or regulation, or to the extent that Plaintiff makes any factual assertions in  
23 Paragraph 50, Mervyn's denies each and every allegation in Paragraph 50 of the Complaint.

24           51. Mervyn's denies each and every allegation in Paragraph 51 of the Complaint.

25           52. Mervyn's denies each and every allegation in Paragraph 52 of the Complaint, denies  
26 that Plaintiff has suffered damages in any amount, or at all, and further denies that Plaintiff is  
27 entitled to any form of relief in this action.  
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2 RESPONSE TO PRAYER FOR RELIEF

3 The remaining allegations in Plaintiff's Complaint are merely prayers for relief. Mervyn's  
4 denies that Plaintiff is entitled to any remedy or relief, including the relief requested in Plaintiff's  
5 Prayer For Relief Section X, including X(1)-(5), and denies that Plaintiff has suffered any injury  
6 or damage in this matter.

7 AFFIRMATIVE DEFENSES

8 Mervyn's alleges the following separate and affirmative defenses, without conceding that  
9 it bears the burden of proof or persuasion as to any of them.

10 FIRST AFFIRMATIVE DEFENSE

11 (Failure To State A Claim)

12 Plaintiff's Complaint, and each purported claim for relief alleged therein, fail to state a  
13 claim against Mervyn's upon which relief can be granted. Plaintiff's allegations fail to set forth  
14 facts adequate to support a prima facie case based upon discrimination due to disabilities.

15 SECOND AFFIRMATIVE DEFENSE

16 (Failure To State A Claim For Injunctive Relief)

17 Plaintiff's Complaint fails to state a claim upon which injunctive relief can be granted  
18 against Mervyn's.

19 THIRD AFFIRMATIVE DEFENSE

20 (Lack Of Standing For Violations Not Encountered)

21 Plaintiff lacks standing to assert the Complaint, and each purported claim for relief alleged  
22 therein, as to any alleged disability access violation not actually encountered by him because  
23 Plaintiff cannot show injury in fact as to such alleged violations.

24 FOURTH AFFIRMATIVE DEFENSE

25 (Lack Of Standing For Claim Under Health & Safety Code Section 19955(a))

26 Plaintiff lacks standing to assert a separate cause of action against Mervyn's pursuant to  
27 California Health and Safety Code Section 19955(a).



1 FIFTH AFFIRMATIVE DEFENSE

2 (Statutes Of Limitation)

3 Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred, in  
4 whole or in part, by the applicable statutes of limitation.

5 SIXTH AFFIRMATIVE DEFENSE

6 (Laches)

7 Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred by the  
8 doctrine of laches.

9 SEVENTH AFFIRMATIVE DEFENSE

10 (Estoppel)

11 Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred by the  
12 doctrine of estoppel.

13 EIGHTH AFFIRMATIVE DEFENSE

14 (Unclean Hands)

15 Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred by the  
16 doctrine of unclean hands.

17 NINTH AFFIRMATIVE DEFENSE

18 (Performance Of Duties)

19 Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred  
20 because Mervyn's fully performed all contractual, statutory, and other duties owed to Plaintiff  
21 under applicable law.

22 TENTH AFFIRMATIVE DEFENSE

23 (No Authority)

24 Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred  
25 because, to the extent that Plaintiff alleges Mervyn's has obligations under state or federal law to  
26 remove barriers at the Mervyn's Facility, the alleged obligations exceed the scope of the  
27 legislated authority.  
28

1 ELEVENTH AFFIRMATIVE DEFENSE

2 (Reliance On Issuance Of Building Permits)

3 Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred  
4 because local building authorities issued appropriate permits and Certificates of Occupancy for  
5 the Mervyn's Facility, and Mervyn's had a right to rely on the issuance of the permits as  
6 establishing compliance with all applicable laws, regulations, orders, and approvals.

7 TWELFTH AFFIRMATIVE DEFENSE

8 (Readily Achievable)

9 Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred  
10 because appropriate accessibility changes have been made and continue to be made at the  
11 Mervyn's Facility to the extent such changes are readily achievable. To the extent that any  
12 changes have not been made that Plaintiff contends should have been made, those changes are not  
13 required under applicable law and are not readily achievable.

14 THIRTEENTH AFFIRMATIVE DEFENSE

15 (Undue Burden)

16 Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred  
17 because, to the extent that alterations have not been made to the Mervyn's Facility that Plaintiff  
18 contends should have been made, those changes were not required under applicable law, and any  
19 requirement to make those changes would impose an undue burden.

20 FOURTEENTH AFFIRMATIVE DEFENSE

21 (Modifications Not Required)

22 Plaintiff has demanded modifications to the Mervyn's Facility that are either not readily  
23 achievable, technically infeasible, not required, would create an undue hardship on Mervyn's,  
24 would fundamentally alter the way Mervyn's provides its goods and services, or would create a  
25 risk to the health and safety of Plaintiff and others.

1 FIFTEENTH AFFIRMATIVE DEFENSE

2 (Reasonableness, Good Faith, And Non-Discrimination)

3 Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred  
4 because Mervyn's acted reasonably, honestly, in good faith, and in a non-discriminatory manner  
5 at all material times based on all relevant facts and circumstances known by it at the time it so  
6 acted.

7 SIXTEENTH AFFIRMATIVE DEFENSE

8 (Not Authorized By Unruh Act)

9 Plaintiff is barred from obtaining relief under California Civil Code Sections 51, *et seq.*  
10 because nothing therein may be construed to require any construction, alteration, repair, structural  
11 or otherwise, or modification of any sort whatsoever, to any existing establishment, facility,  
12 building, improvement, or any other structure.

13 SEVENTEENTH AFFIRMATIVE DEFENSE

14 (No Discrimination)

15 The claim for relief alleged in Plaintiff's Complaint under California Civil Code Sections  
16 51, *et seq.* is barred because Mervyn's' conduct is applicable alike to all persons.

17 EIGHTEENTH AFFIRMATIVE DEFENSE

18 (Not Member Of Protected Class)

19 Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred  
20 because Plaintiff is not a member of the class of individuals that the Americans with Disabilities  
21 Act or California's disability access statutes are designed to protect.

22 NINETEENTH AFFIRMATIVE DEFENSE

23 (Disproportionate Costs)

24 Mervyn's alleges that the cost of some or all of the modifications to the Mervyn's Facility  
25 that Plaintiff seeks in this action is disproportionate in terms of both cost and scope to that of any  
26 alterations made within the statutory period, if any.

1 TWENTIETH AFFIRMATIVE DEFENSE

2 (Equal Access)

3 Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred  
4 because Plaintiff has the same access to the Mervyn's Facility as non-disabled persons.

5 TWENTY-FIRST AFFIRMATIVE DEFENSE

6 (Compliance With Applicable Law)

7 Mervyn's alleges that the goods and services as provided at the Mervyn's Facility to the  
8 public, including Plaintiff, are accessible to and usable by persons with disabilities as required  
9 under federal and state law, including without limitation, the Americans with Disabilities Act, 42  
10 U.S.C. Sections 12101, *et seq.*, the Unruh Act, California Civil Code Sections 51, *et seq.*, the  
11 Blind and Other Physically Disabled Persons Act, California Civil Code Section 54, *et seq.*,  
12 Health and Safety Code Part 5.5, and all other disability access statutes, rules, and regulations.

13 TWENTY-SECOND AFFIRMATIVE DEFENSE

14 (Failure To Mitigate Damages)

15 Plaintiff had a duty to mitigate his damages and, to the extent he failed to do so, any  
16 damages awarded to Plaintiff should be reduced accordingly.

17 TWENTY-THIRD AFFIRMATIVE DEFENSE

18 (Adequate Legal Remedy)

19 Plaintiff is not entitled to any injunctive or equitable relief because he has adequate legal  
20 remedies.

21 TWENTY-FOURTH AFFIRMATIVE DEFENSE

22 (No Irreparable Harm)

23 Plaintiff is not entitled to any injunctive or equitable relief because he has not and will not  
24 suffer irreparable harm or injury.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Improper Party)

Plaintiff's Complaint, and each purported claim for relief alleged therein, are barred to the extent Mervyn's did not and does not own, operate, lease, maintain or have any responsibility for portions of the Mervyn's Facility that allegedly fail to comply with applicable law.

PRAYER FOR RELIEF

Mervyn's does not presently know all the facts and circumstances respecting Plaintiff's claims. Mervyn's reserves the right to amend this Answer should it later discover facts demonstrating the existence of additional affirmative defenses.

WHEREFORE, Mervyn's hereby prays for the following relief:

1. That Plaintiff take nothing by reason of the Complaint and that Judgment be rendered in favor of Mervyn's;
2. That Mervyn's be awarded its attorneys' fees and the costs of suit incurred by it in this action; and
3. For such other and further relief as the Court deems just and proper.

Dated: July 25, 2008.

JONES DAY

By: /S/ Steven M. Zadravec  
Steven M. Zadravec

Attorneys for Defendant  
MERVYN'S, LLC